UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:05 CR 721 ERW
	)	DDN
STEVEN KIDERLEN,	)	
	)	
Defendant.	)	

SUPPLEMENTAL ORDER AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This action is before the court upon the pretrial motions of the parties which were referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b). Hearings were held on February 7 and July 6, 2006.

When he was represented by counsel, defendant Steven Kiderlen filed a motion to suppress evidence, Document 16. After the February 7 hearing, on March 22, 2006, the undersigned filed an Order and Recommendation regarding that motion. (Doc. 23.) Thereafter, defendant filed written motions pro se[1] for discovery of information (Doc. 40) and to suppress evidence and statements (Doc. 39). A supplementary evidentiary hearing was held on July 6, 2006. At the conclusion of the hearing, defendant orally and in conclusory fashion challenged the jurisdiction of the court, which the undersigned has considered an oral motion to dismiss for lack of jurisdiction. Finally, on July 21, 2006, defendant filed a written pro se motion captioned, "Motion to Produce Disprove or Dismiss This Case." (Doc. 50.)

[1]On June 26, 2006, the court granted defendant Steven Kiderlen his motion for leave to represent himself (Doc. 37) and he represented himself at the hearing held on July 6.

I. PRETRIAL DISCOVERY

Defendant Steven Kiderlen has moved pro se for the production of several groups of many items of evidence and information. (Doc. 40.) The pretrial disclosure the government is obligated by law to provide to a defendant is very limited. Under Federal Rule of Criminal Procedure 16, the government must disclose to the defendant any relevant oral statement of the defendant the government intends to offer into evidence at trial, see Fed. R. Crim. P. 16(a)(1)(A), and, under certain circumstances, any written statement the defendant made, see Fed. R. Crim. P. 16(a)(1)(B). The government must disclose the defendant's prior criminal record. See Fed. R. Crim. P. 16(a)(1)(D). The government must disclose to the defendant all documents and objects, within the possession, custody, or control of the government, which are material to the defense, which the government intends to use in its case-in-chief at trial, or which were obtained from or belong to the defendant. See Fed. R. Crim. P. 16(a)(1)(E). The government is required to disclose to the defendant the results or reports of any scientific test or experiment, if the material is in the government's control, possession, or custody, if the attorney for the government knows the material exists, and if it is material to the defense or the government intends to use the material in its case-in-chief. See Fed. R. Crim. P. 16(a)(1)(F).

Aside from Rule 16, under the Due Process Clause of the Fifth Amendment, the government must disclose to the defendant evidence or information, requested by the defendant, that is favorable to the defense, when such is relevant to guilt or punishment, Brady v. Maryland, 373 U.S. 83, 87 (1963), or which could be used to impeach government witnesses, Giglio v. United States , 405 U.S. 150 (1972).

The court has divided into four groups the items defendant seeks.

1.

Defendant seeks all the documents in the possession of the Lincoln County Sheriff's Department relating to the arrests of himself and his wife, Angela C. Kiderlen, and all documents related to charges brought

against Angela and him. He argues that these documents will show that Angela gave her statements to law enforcement involuntarily.

The motion will be denied as moot as to these items. At the hearing held on July 6, 2006, Angela Kiderlen testified[2] and gave her rendition of the circumstances of her statements and cooperation with law enforcement authorities. The court at that time also received into evidence documents which indicate that she was at least considered a subject of the criminal investigation. Further production of information is unnecessary to the defendant and is not required by either Rule 16 or the Due Process Clause.

2.

Defendant also seeks records that indicate that by his alleged actions he injured the State of Missouri or victimized some individual, as is alleged against him. Such information or evidence is not relevant to whether or not defendant committed the unlawful acts alleged in the indictment or concerning which probable cause was shown to the grand jury or to the state court judge who issued the search warrant in this case.

3.

Defendant seeks information about why the government did not prosecute one Angie S. Yowell for the offense with which defendant is charged. He also seeks the production of a wide variety of digital

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[2]Remaining for resolution is the oral motion of the United States that Angela Kiderlen's July 6, 2006, hearing testimony (given on behalf of her husband) be stricken in its entirety, because only on cross-examination by the government she selectively refused to answer some of the government's questions, invoking the marital privilege and her Fifth Amendment right not to be compelled to incriminate herself. During the hearing, the undersigned sustained Angela Kiderlen's invocation of her Fifth Amendment right not to incriminate herself and overruled her invocation of the marital privilege. The hereby overrules the motion of the government to strike the hearing testimony of Angela Kiderlen as moot, because the undersigned has determined that, where it is inconsistent with the testimony of Det. Lingle or Officer Bartlett at the February 7, 2006, hearing, her testimony is not credible.

equipment and records relating to fraudulent website accounts[3] belonging to three individuals and a prominent institution, and he seeks production of an extensive list of official records relating to a state court action and two complaints. All of this, he argues, relates to the possession of and the promotion of child pornography by Angie S. Yowell.

This discovery will be denied. Whether or not another individual committed a crime similar or identical to that with which defendant is charged is irrelevant to his own guilt or innocence. The prosecution has almost unlimited discretion in deciding whom to prosecute and for what criminal acts. Town of Newton v. Rumery, 480 U.S. 386, 396 (1987).

4.

Defendant seeks production of (a) all photographs and reported findings by Bryon Hendrix who analyzed the relevant computer in this action; (b) all Instant Messages and emails between "Kori" and defendant, between Angie Yowell and Sharon Kiderlen, between Lincoln County and Angie Yowell, and between the Missouri state Department of Family Services and Angie Yowell; (c) a list of all law enforcement personnel and their biographical information involved in the investigation of this case and related cases; (d) blue prints, diagrams, floor plans, and any other document that describes the premises of 3179 County View Lane, defendant's residence; and (e) a list of all witnesses the government intends to call at defendant's trial and a list of the questions the government intends to ask each witness.

As stated above, the defendant's entitlement to pretrial disclosure of information or evidence is limited. Items 4(a), 4(b), and 4(d) appear to fall within the scope of Federal Rule of Criminal Procedure 16(a)(1), if the materials relate to the proof of or defense against the allegations in this case and the government has control over the items. The court will require the government to indicate whether said evidence

[3]If, by the reference to fraudulent website accounts, defendant is referring to the language in the search warrant issued on June 2, 2004, described in Finding of Fact 6, set forth on page 6 of this Order and Recommendation, the undersigned has concluded that the inclusion of the phrase "relating to fraudulent web [site] accounts" was an inadvertent error.

exists in its control and whether or not it relates either to its case or to the defense. If the information is in the affirmative, the government shall produce said material to the defendant not later than one calendar week prior to trial.

The court will not require the government to disclose to the defendant the information sought in Item 4(c) above. There is no statutory or constitutional requirement that the government provide such information to the defendant.

The court will not require the government to disclose to the defendant its list of witnesses or what the government's questions to the witnesses are expected to be. Such is not required by law. United States v. White, 750 F.2d 726, 728 (8th Cir. 1984).

The government is otherwise under a constitutional mandate to disclose to the defense favorable information or evidence, or information relevant to the impeachment of government witnesses.

II. MOTIONS TO SUPPRESS

On February 2, 2006, with the advice of counsel, defendant filed a motion to suppress statements and physical evidence, Document 16. After the hearing and recommended ruling on said motion (Doc. 23), on June 26, 2006, defendant filed a renewed motion to suppress evidence and statements, Document 40.

In his renewed motion, defendant alleges (1) that the law enforcement personnel who interviewed his wife and ultimately obtained statements and cooperation from her violated her constitutional rights by failing to advise her of her Miranda rights to remain silent and to counsel, and failed to advise her of the marital privilege not to cooperate with the government against her spouse, defendant Kiderlen; and (2) that the law enforcement officers obtained her cooperation by duress, threats to have her children taken from her, and presenting information to her that would be inadmissible in court.

In considering this motion the undersigned has reconsidered the record in its entirety, including the evidence received in the hearing on February 7 and in the hearing held on July 6, 2006. [4]

From the entirety of the evidence, the undersigned makes the following supplemental findings of fact and conclusions of law:

FACTS

1. On June 1, 2004, Lincoln County, Missouri, Sheriff's Office Detective David Lingle received information from Danielle McCartney, a Missouri state Division of Family Services (DFS) case worker, that Steven Kiderlen had been communicating with K.G., an 11-year-old cousin of his, by computerized instant messaging. Case worker McCartney told Det. Lingle that she had received the information in an emergency hotline call, that in the instant messaging conversation Kiderlen had indicated vulgarly that he had engaged in sexual activity with an 11-year-old female and with two other minor females. Lingle thereafter was provided a written copy of the transcript of the Instant Messaging conversation between K.G. and Kiderlen. The transcript showed that the subject line of the instant message related to "Kori." McCartney identified Kori to Det. Lingle. See Gov. Ex. 1 (February 7, 2006).

2. On June 2, 2004, Det. Lingle and Ms. McCartney spoke with C.C., one of the subject minor females. C.C. told Det. Lingle and McCartney that Kiderlen had touched her in a private area under her clothes.

3. Also, in the morning of June 2, Det. Lingle and Ms. McCartney went to Kiderlen's residence at 3179 Country View Lane, in Moscow Mills, in Lincoln County, Missouri. In the home were Kiderlen, his wife Angela, and three daughters. Det. Lingle told Steven and Angela Kiderlen that he and Ms. McCartney had received a hotline telephone call that child pornography had been sent to a minor child. Ms. McCartney asked the Kiderlens whether she could speak with the children who were present. Mrs. Kiderlen responded that any question to them must be in

[4]The only witness who testified at the July 6, 2006, hearing was defendant's wife, Angela C. Kiderlen.

her and her husband's presence. Lingle asked for Steven's permission to search his residence and his computers. Steven Kiderlen did not agree to this search. However, Kiderlen said he would allow his wife to go into the residence and bring his computer to Lingle. His wife did so.[5] Kiderlen signed a written consent to search form for the computer. [6]

4. Steven Kiderlen then agreed to, and did, travel with Det. Lingle to the Lincoln County Sheriff's Office for a voluntary interview. At no time during this transportation was Kiderlen in custody, told he was in custody, or reasonably believed he was in custody.[7] When they

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[5]Mrs. Kiderlen went and obtained the computer that the household usually used. Another computer in the residence was not working properly and another one had just been purchased. (July 6, 2006, hearing testimony.)

[6]Thereafter, a forensic search of this computer resulted in the determination that there was no child pornography on the computer. The United States has indicated that no evidence derived from this computer will be offered into evidence by the government at trial.

[7]Angela Kiderlen testified that, instead of leaving voluntarily, Steven was arrested, advised of his Miranda rights, and handcuffed, before being taken from the residence. The court credits the testimony of Det. Lingle over that of Angela Kiderlen in this respect.

Mrs. Kiderlen also testified that, after defendant and Det. Lingle left the residence, Police Officer Chris Bartlett drove up in his police vehicle and parked immediately behind Mrs. Kiderlen's truck. Mrs. Kiderlen testified that she wanted to leave to visit her mother-in-law with her child, Amanda. However, because Barlett parked his vehicle immediately behind her truck, she could not leave. She testified that, when she asked Bartlett to move his truck, he said "No" because he was waiting for another officer.

She also testified that, after Det. Lingle and Steven left, police officers kept her from entering her home to use the restroom for approximately one hour. Then she was allowed to enter the residence to use the restroom, but she had to leave the door open. She further testified that, when she finished using the bathroom, Officer Bartlett interviewed her in the bedroom with the door closed. He asked her questions about sexual activities, which made her uncomfortable. He told her that his questions related to the matter then being investigated. She testified that, when the interview was completed, Det. Lingle took her into the living room, frisked her, handcuffed her, and drove her from the residence to the Sheriff's Office in Troy, Missouri, without advising her of her Miranda rights. En route, she (continued...)

arrived at the office, Lingle asked Kiderlen for biographical background information, which Kiderlen provided. During this interview, Kiderlen was allowed to speak with his attorney by telephone. Apparently prompted by the attorney, Kiderlen asked Lingle whether he was then under arrest. Lingle told Kiderlen that he was not under arrest. At that point, Kiderlen left the Sheriff's Office.

5. After Steven Kiderlen left the Sheriff's Office, Det. Lingle prepared his sworn, written affidavit and submitted it to the Circuit Court of Lincoln County in support of an application for a search warrant for Kiderlen's residence at 3179 Country View Lane. The affidavit set forth information provided by DFS case worker Danielle McCartney on June 1, 2004. The affidavit stated that Ms. McCartney advised that she had received an emergency hotline report that Steven Kiderlen was contacting his second cousin, an eleven-year-old female, through the internet. The affidavit stated that McCartney provided Det. Lingle with copies of instant messages in which Kiderlen "implicates himself in sexually abusing two juvenile victims" and in using "kiddreamer 1226" as an internet pseudonym. Gov. Ex. 2 (February 7, 2006). The affidavit also described information provided by Det. Chris Bartlett on June 2, 2004, regarding his participation in the investigation of the molestation of two children. In this regard, the affidavit stated as follows:

> On 06/02/04, Detective Chris Bartlett assisted in the investigation involving the molestation of two children. During the investigation Detective Bartlett interviewed Angie Kiderlen (Dob: 02/22/69) at her residence. During the non-custodial interview Detective Bartlett questioned Angie if

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[7](...continued)
testified, Det. Lingle told her that all this trouble could go away if she told them what they wanted to know. After they arrived, he put her in an interview room. She testified that Det. Lingle told her that she had one more chance to spill her guts, and then he can take her home. She provided the police with information about the computers that she and Steven owned. After three hours, after 7:00 p.m., she was allowed to leave the Sheriff's Office. When she left, Det. Lingle admonished her not to discuss with Steven the events of that day. She testified that, upon returning home, she found that her wedding pictures were missing. It was another two weeks before her children were returned to her. (July 6, 2006, hearing testimony.)

> her or her husband had ever used their personal computer for viewing child pornography material. During such interview Angie stated many time[s] she and her husband had viewed this type of materials. Angie was questioned if any images could possibly have been printed or saved to the computer. Angie replied by stating, "She was not certain, it was possible."

Id.

6. On June 2, 2004, based upon Det. Lingle's affidavit, Lincoln County Associate Circuit Judge Ben Burkemper issued a search warrant for digital computer equipment and related materials found inside 3179 Country View Lane. The search warrant stated the judge's finding of probable cause as established by the officer's affidavit. However, instead of relating the items to be seized to the criminal conduct described by the affidavit, the warrant in seven places defined the items subject to seizure as "relating to fraudulent web sight (sic) accounts." The scope of the warrant authorized a search for the following:

> all computer equipment, central processing units, computer motherboards, printed circuit boards, processor chips, all data drives, hard drives[,] floppy drives, optical drives, tape drives, and or disks, any terminals and or video display units and or receiving devices and or peripheral equipment, any computer software, programs and source documentation, computer logs, diaries, magnetic audio tapes, and recorders, any memory device utilized by the computer, temp files, stored images and documents relating to fraudulent web sight (sic) accounts . . . .

Gov. 3 at 1 and 2 (February 7, 2006).

7. Later on June 2, 2004, the search warrant was executed. Upon entering the residence, Det. Lingle saw that the Kiderlen's two computer central processing units were missing; only the monitors remained. However, the officers seized a letter (identified as being "from Kori to Steve") from inside an office desk drawer, which drawer the officer opened; a sheet of paper identifying Kiderlen as "Kiddreamer 1226" seized from the top of a desk; and a billing statement for the internet account in the name of user "Kiddreamer 1226" which was seized from inside a filing cabinet. Id.

8. Later on June 2, 2004, after Steven Kiderlen left the Sheriff's Office, Angela Kiderlen went on her own to the Lincoln County

Sheriff's Office. She was very upset and crying. She asked to speak with Det. Lingle. She told Lingle that earlier in the day, when the police were at the house and asked for their computer, her husband told her to get their daughter's computer for the officers, instead of theirs, which is what she did. She said that, after her husband walked out of the interview at the Sheriff's Office, he called her on the cell phone. He asked her to come pick him up, and he told her that he had done something bad and needed to get the computers out of the house. She told Det. Lingle that to help him do this she then phoned their daughter at the house and told her to get the other two computer central processing units in the house and to meet her and her husband in Cuivre River State Park. She told Det. Lingle that their daughter did this, that she gave her daughter $100 for bringing the computers to them, and that the daughter left the park. Mrs. Kiderlen told Lingle that, after the daughter left the park, Steven Kiderlen took a crowbar and smashed the computer central processing units on the tailgate of their truck. He then removed the hard drives from the central processing unit boxes and left the smashed boxes in a ditch in the state park. Mrs. Kiderlen told Det. Lingle that she and her husband then took the computers' hard drives out of the state park to the Winfield Lock and Dam area, unsuccessfully tried to break the hard drives open, and then threw them into the Mississippi River. The conversation with Mrs. Kiderlen in the Sheriff's Office lasted approximately 30 minutes.

9. Later on June 2, 2004, Angela Kiderlen showed the Lincoln County Sheriff's Department personnel where the smashed central processing unit boxes were located in the Cuivre River State Park. These items were seized and brought to the Lincoln County Sheriff's Office. Det. Lingle had the smashed central processing unit boxes placed on a counter in the office interview room. He did this so that, when Steven Kiderlen saw them, he would know that there was physical evidence against him before his questioning began.

10. During the evening of June 2, 2004, Det. Lingle arrested Steven Kiderlen and brought him to the Sheriff's Office. As Kiderlen was being taken into the interview room, he saw the central processing units on the counter in the interview room. Upon seeing them, without

being asked any question, Kiderlen said, "Where did you find those?" Kiderlen made no formal statement after that. As Det. Lingle began to orally advise Kiderlen of his constitutional rights to remain silent and to counsel, Kiderlen told Lingle that he was not going to waive his rights. Thereafter, Kiderlen was not questioned.

11. On June 3, 2004, Det. Lingle contacted Angela Kiderlen. In that conversation, Mrs. Kiderlen agreed to show him where the hard drives were thrown into the Mississippi. She directed Lingle as he drove[8] to the area around Winfield Lock and Dam and showed him where the hard drives had been thrown into the river. Later, a dive team was able to recover the two hard drives. However, they were too damaged to allow the recovery of data from them.

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[8]Angela Kiderlen testified that Det. Lingle showed her a one-page document captioned "Probable Cause Statement." Def. Ex. A (July 6, 2006). The document was signed by Det. Lingle and stated reasons he believed Angela Kiderlen had committed the offense of tampering with evidence. Angela testified that Det. Lingle told her that all this could go away and she could get her children back, if she testified against Steven Kiderlen and wrote a statement against him. Thereafter, he drove her in his vehicle to the Winfield Lock and Dam on the Mississippi River. En route to this area, Det. Lingle suggested that she write a statement. She did so, handwriting a four-page statement, Government Exhibit 1 (July 6, 2006). Angela testified that she included information suggested by Det. Lingle and that much information in the statement is not true. She testified that, before writing this statement, Det. Lingle did not advise her of her rights to remain silent or to counsel or about the marital privilege.

Thereafter, in August 2005, Angela Kiderlen signed two written statements which recanted as untrue and involuntary her statements to the police on June 2 and June 3, 2004. Def. Ex. E (July 6, 2006). For the reasons set forth in the Discussion portion of this document, the undersigned does not credit Angela Kiderlen's testimony that her statements and cooperation were coerced and involuntary.

DISCUSSION

Defendant's statements

None of the statements made by defendant should be suppressed. The government has the burden of establishing the constitutional admissibility of defendant Kiderlen's statements by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 489 (1972); Colorado v. Connelly, 479 U.S. 157, 169 (1986). The admissibility of his statements depends upon whether they are constitutionally voluntary, Connelly, 479 U.S. at 163-67; and, when the statements are made during police interrogation while the defendant was in custody, whether the defendant had been advised of his constitutional rights to counsel and to remain silent, as prescribed by Miranda v. Arizona, 384 U.S. 436 (1966); and, if the statements were given during custodial interrogation, whether the defendant knowingly and voluntarily waived the Miranda rights, North Carolina v. Butler, 441 U.S. 369, 373, 375-76 (1979) .

The record indicates that defendant Kiderlen made statements at his home on June 2 (Finding 3), in the sheriff's office during the daylight hours of June 2 (Finding 4), and in the sheriff's office during the evening hours of June 2 (Finding 10). None of these statements were involuntary, because none of them were the result of government overreaching, such as mental or physical coercion, deception, or intimidation. Connelly, 479 U.S. at 169-70; United States v. Goudreau, 854 F.2d 1097, 1099 (8th Cir. 1988).

None of the subject statements came after defendant was advised of his Miranda rights. Thus, the relevant question is whether any of defendant's statements were made during custodial interrogation. Statements not made during custodial interrogation are not subject to Miranda. See Miranda, 384 U.S. at 444. Defendant's Finding 3 statements were not made at a time when he was in custody for Miranda purposes. At that time, defendant spoke with the officers outside his home. He was not formally placed under arrest. He refused the request for a consensual search of his home. Ultimately, the officers left without placing him under arrest. United States v. Brown, 990 F.2d 397, 399 (8th Cir. 1993)(discussing six relevant factors for determining whether or not someone is in custody for Miranda purposes).

The Finding 4 statements by defendant, although made in the sheriff's office, were not custodial. Defendant went voluntarily to the sheriff's office; he was not arrested or otherwise compelled to go there. When so advised by his attorney, defendant left the sheriff's office without opposition by law enforcement. Even if he had been in custody at the time, the law is clear that the booking, biographical-type information provided by defendant in answer to the officer's questions are exempt from the requirements of Miranda. Pennsylvania v. Muniz, 496 U.S. 582, 601-02 (1990); United States v. Horton, 873 F.2d 180, 181 n.2 (8th Cir. 1989) .

The Finding 10 statement was clearly custodial, because defendant had been formally arrested and taken to the sheriff's office. However, the question arises as to whether the statement "Where did you find those?" was made in response to interrogation. Interrogation for Miranda purposes includes "words or actions on the part of the police . . . that *the police* should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980)(emphasis added).

In the case at bar, Det. Lingle purposely placed the three damaged central processing unit boxes in view in the interview room so that defendant could see them following his formal arrest. Clearly, this was done intentionally so that he would be more likely to make incriminating statements than if he believed the police had no evidence against him. Nevertheless, this strategic action by the police was not by itself "interrogation," because it did not involve any degree of compulsion.

No evidence indicated that there was any intention or belief by the police that defendant would make a statement *only* after viewing this evidence, without being questioned. Defendant had previously exercised his rights to remain silent and to not cooperate with the police. He had walked out of the police station earlier in the day. He deviously had his wife give the police his daughter's computer instead of his own when the police visited his residence. By itself, without any degree of compelled responses that questioning entails, merely displaying the seized evidence was not interrogation for Miranda purposes. Cf., United States v. Hurst, 228 F.3d 751, 760 (6th Cir. 2000)(not the functional

equivalent of interrogation for officer to tell suspect that the police had "good information on you" because this police statement involved no element of compulsion that suggests a Fifth Amendment violation).

Seized physical evidence

The items of physical evidence which are the subjects of the motion to suppress are the three items seized in the execution of the search warrant (Finding 7), three smashed central processing unit boxes seized in Cuivre River State Park (Finding 9), and two computer hard drives seized from the Mississippi River (Finding 11).

The three smashed central processing unit boxes and the two hard drives should not be suppressed, because they were abandoned by defendant. By abandoning the property, defendant gave up any reasonable expectation of privacy in them under the Fourth Amendment. California v. Hodari D., 499 U.S. 621, 629 (1991); Abel v. United States, 362 U.S. 217, 241 (1960); United States v. Tate, 821 F.2d 1328, 1330 (8th Cir. 1987).

The items seized from the house pursuant to the state court search warrant should not be suppressed. The issue before this court when reviewing the validity of the issuance of a search warrant is whether the supporting materials gave the issuing judge a substantial basis for concluding that probable cause existed for the issuance of the warrant. Illinois v. Gates, 462 U.S. 213, 238-39 (1983); United States v. Luloff, 15 F.3d 763, 768 (8th Cir. 1994). Probable cause means a "'fair probability that . . . evidence of a crime will be found in a particular place,' given the circumstances set forth in the affidavit." United States v. Horn, 187 F.3d 781, 785 (8th Cir. 1999) (quoting Gates, 462 U.S. at 238).

Further, a search warrant must describe the items to be seized with sufficient particularity "to enable the searcher to reasonably ascertain and identify the things authorized to be seized." United States v. Saunders, 957 F.2d 1488, 1491 (8th Cir.), cert. denied, 506 U.S. 889 (1992); see also United States v. Horn, 187 F.3d 781, 788 (8th Cir. 1999).

In the case before the court, the search warrant ordered the seizure of computer and digital automation equipment and related materials, and documents, relating to fraudulent web site accounts. See Gov. 3. The warrant was issued upon the written affidavit of Det. Lingle. The affidavit indicated that a personal computer, located in defendant's residence at 3179 Country View Lane, likely contained child pornography and evidence of defendant's sexual abuse of two juveniles. The affidavit stated also that defendant used the instant message pseudonym of "kiddreamer 1226." No mention of fraudulent web site accounts was made in the affidavit. See Gov. 2.

Nevertheless, the officer's affidavit provided probable cause to believe that the residence contained digital computer equipment that had been used in child pornography and in the sexual abuse of two juveniles. The judge who issued the search warrant considered this affidavit and was thus authorized to issue a search warrant for this purpose. No evidence indicated that the inclusion of the words "relating to fraudulent web [site] accounts" in the warrant was anything but inadvertent or that the significance of this variance from the probable cause facts was discerned and understood by the executing officers who included Det. Lingle.

A similar situation occurred in Massachusetts v. Sheppard, 468 U.S. 981 (1984). In that case, during a murder investigation an officer submitted an affidavit for a search warrant to seize items believed related to the murder. However, the judge used a warrant form for the seizure of controlled substances but inadvertently did not modify the form to cover the nature of the investigation described in the affidavit, as he said he would. The question presented to the Supreme Court was whether there was an objectively reasonable basis for the officer's mistaken but reasonable belief that the warrant was proper. 468 U.S. at 988. The court found that there was such a basis. The officer prepared the proper affidavit for a search warrant and submitted it to the judge. Based upon the circumstances of the case, the Supreme Court held that "a reasonable officer would have concluded . . . that the warrant authorized a search for the materials outlined in the affidavit." Id. at 989.

In the instant case, the issuing judge properly found probable cause as set forth in the affidavit, and issued the warrant but with incorrect language regarding "fraudulent web sight accounts" in its scope. The fault lay with the judge's action, not the officer's. A reasonable officer could conclude that the warrant authorized the entry into the residence and the search for evidence of the crimes described in Det. Lingle's affidavit.

In the execution of the warrant, no computer-related equipment was seized. Rather, three pieces of paper were seized from the residence: a "letter from Kori to Steve," a document identifying defendant as "kiddreamer 1226," and an internet user billing statement for the "kiddreamer 1226" account. See Gov. 3 at 3. Clearly, these items were within the intended scope of the search warrant, because they were documents related to the probable cause information in Det. Lingle's affidavit. When he executed the warrant, Det. Lingle knew that the name "Kori" was involved in the investigation and that the name "kiddreamer 1226" was a participant in the instant message conversation transcript he had seen earlier in the day provided by the DFS caseworker. See Gov. 1. Therefore, he reasonably concluded that the three documents were evidence of criminal sexual activity involving minors.

The warrant was executed in good faith and the seized items should not be suppressed.

Angela Kiderlen's testimony on July 6, 2006

The gist of the testimony of Angela Kiderlen at the July 6, 2006, hearing was that her cooperation with authorities and her statements to the officers about her husband's activities resulted from unlawful coercion, were in violation of her Miranda rights, and were in violation of her privilege not to be compelled to make statements about her spouse. These arguments relate to whether the June 2, 2004, state court search warrant was lawfully issued. None of these arguments demeans the legality of the state court search warrant.

The Missouri state court search warrant was constitutionally issued and executed, whether or not Angela Kiderlen's statements to the police were factually true or false, whether or not they were coerced or

voluntary, and whether or not she had been advised of her rights to remain silent and to counsel, as required by Miranda v. Arizona, 384 U.S. 366 (1966).

First, the constitutional rights that defendant is now asserting as a basis for excluding evidence against him, belong to Angela and not to him. To have standing to complain about the violation of constitutional rights, he must assert that his own rights have been violated; he may not vicariously seek relief for any perceived violation of her rights. United States v. Salvucci, 448 U.S. 83, 86-7 (1980); Alderman v. United States, 394 U.S. 165, 174 (1969); United States v. Miranda, 65 F. Supp. 2d 1002, 1009 n.4 (D. Minn. 1999).

Second, in any event, Angela Kiderlen's statements were constitutionally voluntary. Government overreaching, such as mental or physical coercion, deception, or intimidation may render statements or cooperation involuntary. Colorado v. Connelly, 479 U.S. 157, 169-70 (1986); United States v. Goudreau, 854 F.2d 1097, 1099 (8th Cir. 1988).

In this case, Angela Kiderlen's children were placed in the custody of her parents during the investigation of defendant and herself. She testified that Officer Bartlett's statement about the prospect of having her children returned to her was held out to induce her cooperation, that she was made uncomfortable by his requiring her to leave the bathroom door open while she used the toilet, and that she was made uncomfortable by his questioning her in her bedroom alone about sexual matters. She also testified that he told her what to write when she was in his vehicle en route to the Winfield Lock and Dam.

After viewing the demeanor of Angela Kiderlen during the July 6 hearing, and considering the entirety of the evidentiary record, the undersigned does not credit her testimony or her statements recanting her statements to law enforcement, that she was coerced into giving her statements by the actions of Officer Bartlett. Angela's original statements to law enforcement implicated herself in criminal activity. Her subsequent statements and testimony that she was coerced into making the original statements were the after-the-fact products of her desire to protect herself and her husband from criminal liability. Throughout the hearing testimony she exhibited a strong mental demeanor. No

credible evidence indicated that Officer Bartlett did anything more than present her with accurate facts about the nature of the investigation of which she was aware.

The invocations by defendant and by Angela Kiderlen of the marital privilege to exclude her statements to law enforcement from the investigation are without merit. The marital privilege was not available to defendant or to her to prohibit her statements to Officer Bartlett from being used in Det. Lingle's search warrant affidavit. The marital privilege recognized by the federal courts for federal proceedings, such as this action, has two components. The privilege protects confidential communications between spouses and it gives each spouse the right to decide whether or not to testify against the other spouse; it does not give either spouse the right to prohibit the other from testifying. Trammel v. United States, 445 U.S. 40, 43-4 (1980); United States v. Espino, 317 F.3d 788, 795-96 (8th Cir. 2003).

The marital privilege is based upon federal common law and Federal Rule of Evidence 501, not the Constitution. Espino, 317 F.3d at 795. The privilege is applicable to statements offered into evidence in a testimonial context, not to extra-judicial statements used to establish probable cause for the issuance of search warrants or to statements made in interviews with police. Cf., United States v. Morgan, 2001 WL 1402998 at *4 (D. Me. 2001) (an "evidentiary privilege, applicable to testimony offered against a party, is inapplicable in the situation where the disclosing party has merely provided information to a government agency"); United States v. Lefkowitz, 464 F. Supp. 227, 233 n.3 (C.D. Calif. 1979)(marital privilege does not implicate constitutional rights and is inapplicable to providing information to a governmental agency). Although Angela Kiderlen, in August 2005, recanted her statements to the police,[9] nothing in the record indicates that, when the affidavit of Det. Lingle was submitted to the state court judge for the issuance of a search warrant, either Det. Lingle or Officer Bartlett believed that Angela's statements were false or that

[9]See Def. Ex. C and her testimony during the hearing on July 6, 2006.

either officer acted with reckless disregard for whether they were true or false. Franks v. Delaware, 438 U.S. 154, 155 (1978). Rather, the information provided by the DFS case worker corroborated her statements.

In any event, the statements Angela Kiderlen gave to Officer Bartlett, which Det. Lingle described in the affidavit, were unnecessary to the affidavit's showing of probable cause for the state court judge's issuance of the search warrant. Probable cause was sufficiently established by the information provided by DFS case worker McCartney, the statement of a minor involved with defendant, and copies of computerized internet Instant Messaging messages in which defendant implicated himself in sexual activity with minors. Therefore, defendant would be entitled to no relief, even if Angela's statements were involuntary, which the undersigned does not find. Id. at 155-56 (entitlement to relief requires that without the subject statement in the affidavit there would have been no probable cause for the issuance of the search warrant); United States v. Lucca, 377 F.3d 927, 931 (8th Cir. 2004).

III. JURISDICTION OF THE COURT

As stated above, at the conclusion of the hearing held on July 6, 2006, defendant challenged the jurisdiction of the court. The undersigned considers this statement to be an oral motion to dismiss the action for lack of jurisdiction.

Generally, the jurisdiction of the court in this action is bi-fold. First, the court has jurisdiction over the person of the defendant, because he is in the custody of the court and properly served with process. Cf., United States v. Cole, 416 F.3d 894, 896 (8th Cir. 2005)(primary jurisdiction over the person of a defendant is obtained by custody).

Second, defendant is charged with the violation of a federal offense set forth in a Congressional statute. Congress has given this

court jurisdiction to preside over the prosecution of defendants charged with violations of federal criminal statutes. See 18 U.S.C. § 3231.[10]

IV. Document 50

Finally, defendant has filed a written motion, Document 50, which is captioned, "Motion to Produce Disprove or Dismiss This Case." In the motion, defendant in wide-ranging multi-faceted arguments, asserts that he is not a party to the social compact, embodied in the Constitution and laws of the United States, between the citizens of the United States and a federal corporation known as U.S.A., Inc., and he is not covered by the government's statutes. He asserts he is entitled to substantial compensation for his imprisonment and he and his family are entitled to immunity from prosecution for any past or future crimes he and they may have committed.

As set forth above, defendant is subject to the jurisdiction of the court. Contrary to defendant's arguments, defendant is subject to the Constitution and other laws of the United States.

V. Document 53

On July 24, 2006, defendant filed a document captioned, "SUPPRESSION OF ADDITIONAL EVIDENCE WITH SUPPORTING DOCUMENTS," Document 53. Because of the requests made in the body of this document, this document is considered a motion to suppress evidence, to dismiss, and for other relief. The filing is composed of a 23-page written memorandum to which is attached 256 pages of investigative-type

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[10]Section 3231 provides in pertinent part:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

18 U.S.C. § 3231.

documents[11] all of which have been filed under seal because of the personal nature of information contained in the documents. Id.

Defendant's memorandum re-argues positions previously taken by the defendant on the suppression issues, argues that certain government witnesses and evidence are untruthful, that certain items of evidence had not been disclosed to him, and that some of the government's evidence is either fabricated or inadmissible. These arguments either have been dealt with in this Order and Recommendation, are irrelevant to the pretrial issues before the court, or are relevant only to trial evidentiary issues. Further, regardless of the pretrial discovery provided to the defendant by the government, it is apparent that defendant has discovered much documentary and other information. For these reasons, defendant's renewed request for the suppression of evidence and to dismiss the action should be denied.

However, in Document 53, the defendant also seeks an order that the government return to him the computer he turned over to the government voluntarily on June 2, 2006. See Doc. 53 at 11; Finding 3 on pages 6-7 above. After this computer was forensically examined by the government, the government indicated that no evidence derived from the computer will be offered into evidence by the government at trial. See footnote 6 on page 7 above.

The undersigned will recommend the denial of the defendant's request that the computer be returned to him. Federal Rule of Criminal Procedure 41(g) provides for the return of unlawfully seized property. The computer that defendant refers to was lawfully acquired by the government. Even though the government has stated that it does not presently intend to offer the computer or its contents in its case-in-chief, the undersigned cannot say that the computer will ultimately be without evidentiary value or relevance. Therefore, the court will not order the government to return the computer to defendant at this time. However, the government may do so, if it wishes.

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[11]Among these documents apparently are copies of exhibits identified by the parties during the hearing held on July 6, 2006, which were copied by the clerk for the parties following that hearing. See Doc. 44.

For these reasons, unless otherwise ordered by the court,

IT IS HEREBY ORDERED that the motion of defendant "to discover via subpoena duces tecum" (Doc. 40) is sustained in that, **not later than August 31, 2006**, the United States shall provide defendant with (a) copies of any evidence in its possession and control that is favorable to the defense or relevant to the impeachment of any government witness, (b) copies of the opinions and reports of any expert witness it intends to offer into evidence in its case-in-chief, and (c) copies of exhibits, in its possession and control, that are material to the defense. In all other respects the Document 40 motion for discovery is denied.

IT IS FURTHER ORDERED that the Clerk of the Court forthwith provide the United States Marshals Service with a copy of this Order and Recommendation for delivery to the defendant at his place of incarceration.

IT IS HEREBY RECOMMENDED that the motions of defendant to suppress evidence and statements (Docs. 16, 39, 53) be denied.

IT IS FURTHER RECOMMENDED that the motions of defendant to dismiss the action (Docs. 50, 53) be denied.

IT IS FURTHER RECOMMENDED that the oral motion of defendant to dismiss the action for lack of jurisdiction be denied.

IT IS FURTHER RECOMMENDED that the request of defendant for the return of the computer obtained by the government from him on June 2, 2004, (Doc. 53) be denied.

The parties are advised they have until August 15, 2006, to file written objections to this Order and Recommendation. The failure to file objections may result in a waiver of the right to appeal issues of fact.

DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed on August 1, 2006.